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Supreme Court, U.S.
FILED

No. 03 370 AUG 15 2003

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MONTGOMERY BLAIR SIBLEY,

Petitioner,

vs.

LOIS SPEARS, DIRECTOR, MIAMI-DADE COUNTY DEPARTMENT OF CORRECTIONS AND REHABILITATION AND BARBARA SIBLEY,

Respondents.

On Petition for Writ of Certiorari to the Florida Supreme Court

Petition for Writ of Certiorari

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44 pp

QUESTIONS PRESENTED FOR REVIEW

The Florida Supreme Court has held that pursuant to their appellate rules they promulgated, and their interpretation of said rules, they do not have jurisdiction to review a Florida District Court of Appeals's *per curiam* denial of a habeas corpus petition, when no written opinion is issued by the District Court of Appeals. Additionally, Florida's Third District Court of Appeal has held that they can deny a habeas corpus petition *per curiam* without a written opinion. These holdings raise three substantial federal questions that warrant immediate review by this Court:

1. Whether Florida violates the equal protection clause of the Fourteenth Amendment by granting to certain litigants Florida Supreme Court review of District Court of Appeals denials of Habeas Corpus petitions based solely upon the discretion of the District Court of Appeals in issuing a written decision when denying a habeas corpus petition?

2. Whether Florida's Third District Court of Appeals violated the equal protection clause of the Fourteenth Amendment when they denied Petitioner's habeas corpus petition *per curiam* without opinion when other factually and legally similarly situated litigants received (i) written opinions, and (ii) the granting of their petitions for habeas corpus?

3. Whether the arbitrary and standardless manner in which the Florida Third District Court of Appeals issues *per curiam* without opinion decisions violates the equal protection clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

The following individuals and entities are parties to the proceeding in the court below:

Montgomery Blair Sibley, Petitioner/Appellant.

Lois Spears, Director, Miami-Dade County, Florida Department of Corrections and Rehabilitation, and Barbara Sibley, Respondents/Appellees.

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

The Petitioner, Montgomery Blair Sibley, through undersigned counsel prays that a writ of certiorari issue to review the judgment and opinion of the Florida Supreme Court entered in this proceeding on May 27, 2003, because the State Court has far departed from the accepted and usual course of proceedings regarding *habeas corpus* relief, and it conflicts with decisions of this Court and numerous United States courts of appeal.

OPINIONS BELOW

The November 22, 2002, order of the Florida Circuit Court in and for Miami-Dade County, Florida is reprinted in the appendix hereto, *Appendix -2, infra.* The November 22, 2002, opinion of the Florida Third District Court of Appeals is reprinted in the appendix hereto, *Appendix-5, infra.* The December 22, 2002, opinion of the Florida Third District Court of Appeals is reprinted in the appendix hereto, *Appendix-6, infra.* The January 31, 2003, and May 27, 2003, opinions of the

Florida Supreme Court are reprinted in the appendix hereto. *Appendix-18* and *Appendix-20, infra.*

JURISDICTION

The judgment of the Florida Supreme Court was entered on May 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Preliminary Facts

In July 1994, Petitioner, Montgomery Blair Sibley ("Montgomery Blair Sibley"), and Barbara Sibley, separated and were divorced in the State of Florida. Montgomery Blair Sibley was given custody of the three children of the marriage, and upon the division of property neither paid nor received child support or alimony. From 1994 to September 2000, Montgomery Blair Sibley was the "primary residential custodian" of the three children, and at all times was a nurturing father.

In 1996, Montgomery Blair Sibley re-married. In the spring of 2000, pursuant to the Marital Settlement Agreement and orders of the Family Court, Montgomery Blair Sibley provided notice to his former wife of his intent to relocate to the State of Maryland with the minor children due to the depressed

economics in the State of Florida.[1] To supplement his income while establishing a law practice in the District of Columbia, in 2001, Montgomery Blair Sibley's father purchased an on-going business of a company fabricating shipping cases which Montgomery Blair Sibley became employed at as the general manager.

In flagrant disregard of his rights and in violation of the relevant court orders, Montgomery Blair Sibley's former wife refused to return the children to him at the conclusion of their summer of 2000 vacation. Instead, the former wife moved for a change in custody on July 27, 2000.

Subsequently, on August 5, 2002, acting outside of its judicial authority, the Family Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, refused to enforce Montgomery Blair Sibley's rights in his minor children and without any basis of fact as to Montgomery Blair Sibley's

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[1] Montgomery Blair Sibley is a member in good standing of the States of New York and Florida Bars, and the District of Columbia Bar.

current economic condition *vis-a-vis* either his current income or that of his former wife's, ordered that he pay child support of $4,000.00 per month from July 2000, plus tuition to private schools and college for the three children.

Facts in Support of Petition

Pursuant to an order of the Family Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, Petitioner was incarcerated for "indirect contempt" on November 22, 2002, for failing to pay child support which the Court found he personally had the ability to pay. *Appendix-2, infra.* On that same day, Petitioner filed a petition for writ of habeas corpus with the Florida Third District Court of Appeals which has jurisdiction over the 11th Judicial Circuit in and for Miami-Dade County, Florida, which was assigned Case No. 3D02-3143.

Later that same day, the Florida Third District Court of Appeals denied Petitioner's petition for writ of habeas corpus *per curiam* without explanation by written decision in Case No. 3D02-3143. *Appendix-5, infra.*

The following day, November 23, 2003, Petitioner filed a notice of appeal with the Florida Third District Court of Appeal of the November 22, 2002, Family Court order which was assigned Case No. 3D02-3171.

Thereafter, on December 20, 2002, Petitioner filed with the Florida Supreme Court his "Emergency Petition for Writ of Habeas Corpus, or Alternatively, Petition for Writ of Mandamus And/Or Petition for Conflict Discretionary Jurisdiction," which was assigned Case No. SC02-2644.

On December 23, 2003, the Florida Third District Court of Appeals entered its order in *Sibley v. Sibley*, Case No. 3D02-3171, 833 So.2d 847 (Fla. 3d DCA 2002) *Appendix-6, infra* affirming Montgomery Blair Sibley's incarceration "for indirect contempt," holding remarkably that (i) "the record shows substantial assets, although admittedly not in the purge amount, in his [Montgomery Blair Sibley's] own name" *Id.* at footnote #2, and (ii) Montgomery Blair Sibley "**may command, simply by asking, the payment of the purge amount through his very**

wealthy father. . ." *Id.* (Emphasis added).

In a dissenting opinion the Honorable Judge Cope, pointed out that the holding of the majority that Montgomery Blair Sibley's "very wealth father" can pay – was issued by the majority based on the "`tipsy coachman' doctrine, or `right for the wrong reason' rule" for which there was no factually support in the record. *Appendix-8, infra.*

On January 31, 2003, the Florida Supreme Court entered its order, without citing either authority or precedent, treating Montgomery Blair Sibley's December 20, 2002, *habeas corpus* petition[2] as a prematurely filed Notice to Invoke Discretionary Jurisdiction from the decision of the Third District Court of Appeal in *Sibley v. Sibley*, 3D02-3171 and, *sua sponte*, changed the style of the case from *Montgomery. Blair Sibley v. Lois Spears, Director, Miami-Dade County Department of Corrections and Rehabilitation, and Barbara Sibley* to

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[2] Montgomery Blair Sibley was incarcerated on November 20, 2002, until February 7, 2003.

Montgomery Blair Sibley v. Barbara Sibley, Case No. SC02-2644, *Appendix-18, infra.*

On May 27, 2003, the Florida Supreme Court issued its final order in Case No. SC02-2644, declaring that (i) "[h]aving reviewed petitioner's response to this Court's order to show cause dated March 13, 2003, this Court hereby amends it previous order dated January 31, 2003, to make clear that this case is a discretionary review proceeding from the decision of the Third District Court of Appeal in *Sibley v. Spears*, 3D02-3143 (Fla. 3d DCA Nov. 22, 2002), and not a discretionary review proceeding from the decision of the Third District in *Sibley v. Sibley*, 833 So.2d 847 (Fla. 3d DCA 2002), and (ii) hereby changes the style of this case back to *Montgomery Blair Sibley v. Lois Spears, Director, Miami-Dade County Department of Corrections and Rehabilitation, and Barbara Sibley.*

The Florida Supreme Court then went on to hold that it was "without jurisdiction to review the decision of the Third District Court of Appeal in *Sibley v. Spears*, 3D02-3143 (Fla. 3d

DCA Nov. 22, 2002), and dismissed the case for lack of jurisdiction. See *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002)". *Appendix-20, infra.*

On September 11, 2003, a hearing is to be held by the Family Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, to determine whether to re-incarcerate Montgomery Blair Sibley base on his "indirect contempt" in not complying with the effective socialist concept of domestic relations law that "his very wealthy father" can pay his purge amount for attorney fees awarded to the former wife.

REASONS FOR GRANTING THE WRIT

The principal reason for granting this writ is that Florida's procedural handling of the *habeas corpus* petition is contrary to clearly established Federal law, as determined by this Court. As such, this Court alone is in a position to prevent the further denial of substantial Constitutional rights based on procedural gamesmanship. Therefore this Court must reverse Florida's trend, for as Hallam, (*Middle Ages*, vol. ii., c. iv.)

noted, the writ of *habeas corpus* is "the principal bulwark of English liberty," and this case presents an erosion of that writ to the extent that it is rendered meaningless.

I. Florida's Habeas Corpus Review Scheme Violates Equal Protection and United States Supreme Court Precedent

The Florida Supreme Court denied review and dismissed Montgomery Blair Sibley's petition for writ of *habeas corpus* upon its decision in *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002). In that case the Florida Supreme Court held that:

> In the interest of clarity, we therefore hold that this Court does not have discretionary review jurisdiction or extraordinary writ jurisdiction to review per curiam denials of relief, issued without opinion or explanation, whether they be in opinion form or by way of unpublished order. Accordingly, we hereby dismiss the "all writs" and extraordinary writ petitions filed by petitioners Stallworth, Davis, and Anderton and dismiss review in petitioner Kitt's case. Consistent with both the express provisions of Florida Rule of Appellate Procedure 9.330(d) and this Court's interpretation of that rule as applied to extraordinary writ petitions seeking review of per curiam decisions issued without written opinion, no motions for rehearing or clarification will be entertained in these cases or in cases which are

> dismissed in the future based on the reasoning set forth in this opinion (Footnote omitted).

As such, in Florida there are now two classes of litigants in state habeas corpus proceedings. The first – when graced by a written decision of the Florida District Court of Appeal – have a statutory right to seek discretionary review to the Florida Supreme Court which then has the obligation to conform such a decision with prior case law and precedent. The second class is denied Supreme Court review of a Florida District Court decision denying a petition for writ of habeas corpus when that denial is made without written opinion.

Such a system violates substantial Constitutional rights and guarantees of the Equal Protection clause of the Fourteenth Amendment as it does not rationally further a legitimate governmental interest. *E.g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55, 93 S.Ct. 1278, 1308; 36 L.Ed.2d 16 (1973); *McGinnis v. Royster*, 410 U.S. 263, 270; 93 S.Ct. 1055, 1059; 35 L.Ed.2d 282 (1973); *see also Swisher v*

True, Fourth Circuit Court of Appeals, Docket No. 02-10 (Decided March 28, 2003)[3]

Moreover, as this Court would not accept such a result in the administrative arena, it must not condone such procedure in the far more important arena of *habeas corpus* petitions. *See: Burlington Truck Lines, Inc v. United States,* 371 U.S. 156,.167; 83 S.Ct. 239; 9 L.Ed.2d 207 (1962) ("There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice.").[4]

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[3] Under 28 U.S.C. § 2254(d), a federal court may grant *habeas* relief is a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *id* § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented in State court proceeding," *Id.* §2254(d)(2)

[4] Similar to the Rules Enabling Act, 28 U.S.C. § 2072, that prohibits federal rules from abridging substantive rights, the Florida Supreme Court is restricted by the Constitution of the State of Florida .

II. Florida's Third District Court of Appeals and Supreme Court Violate Equal Protection Guarantees When They Assumed Away the Habeas Corpus Petitions Based on Their Procedural Rules Concerning Unwritten Decisions

In this case, Florida's Third District Court of Appeals violated the equal protection clause of the Fourteenth Amendment when it denied Montgomery Blair Sibley's habeas corpus petition *per curiam* without opinion when other similarly situated litigants received (i) written opinions, and (ii) had their petitions for habeas corpus granted.

In *Marbury v. Madison*, 5 U.S. 137 (1803) this Court recognized that inherent in every judicial decision was a declaration and interpretation of the relevant general principles of law. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

Fundamental to this decision making process was that the enunciated law be subsequently applied to subsequently similarly

situated litigants. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) ("But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally." *Id.* at 544.)

Here, in this instance, Montgomery Blair Sibley, who was situated similarly to other litigants was **not** treated the same as them as Montgomery Blair Sibley (i) did not receive a written opinion explaining the basis of the denial and (ii) the denial of his petition for writ of habeas corpus simply ignored the cogent arguments of fact and law that other factually and legally similarly situated litigants had advanced when their petitions for writ of habeas corpus were granted.

As Mr. Justice Frankfurter stated in *Brown v. Allen* ,344 U.S. 443, 512; 73 S.Ct. 397; 97 L.Ed. 469 (1952):

> The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this

> does not mean that prison doors may readily be opened. **It does mean that explanation may be exacted why they should remain closed**. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. 'The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom.' Chief Justice Chase, writing for the Court, in *Ex parte Yerger*, 8 Wall. 85, 95, 19 L.Ed. 332. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments. (Emphasis added).

By denying Montgomery Blair Sibley's writ of habeas corpus without written explanation, the Florida Third District Court of Appeals, as well as the Florida Supreme Court, have violated the above cited tenant of the writ of *habeas corpus* – that "explanation may be exacted why they should remain closed". This is particularly necessary in this case as Montgomery Blair Sibley does not have the keys to his cell and the prison door is to remain closed to him unless his "very wealthy father" is forced to pay which is a novel interpretation of the law to say the least.

Also he did not timely receive such an explanation when

other similarly situated litigants did, and as such this practice of the Florida Third District Court of Appeals must be reviewed to insure the integrity of the practice of habeas corpus proceedings in Florida.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

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Opinions Below

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The November 22, 2002, opinion of the Florida Third District Court of Appeals *Appendix-5*

The December 22, 2002, opinion of the Florida Third District Court of Appeals *Appendix-6*

The January 31, 2003, opinion of the Florida Supreme Court *Appendix-18*

The May 27, 2003, opinion of the Florida Supreme Court *Appendix-20*

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 94-18177 FC 19

IN RE: The Marriage of

BARBARA SIBLEY

Petitioner,

and

MONTGOMERY BLAIR SIBLEY

Respondent.

ORDER OF CONTEMPT AND COMMITMENT TO THE MIAMI-DADE COUNTY CORRECTIONS DEPARTMENT

This cause has come on to be heard upon Mr. Sibley's counsel's Motion for an Emergency pre-incarceration hearing. The Court has previously conducted a pre-incarceration hearing in conformance with the requirements of the law and heard extensive testimony from Mr. Sibley himself at that time. The Court granted this hearing in order to give Mr. Sibley every opportunity to either purge the Contempt or to make a showing of a change in circumstances that would persuade the Court to stay the incarceration. To that end, the Court heard argument and a proffer from Mr. Sibley's counsel. The factual proffers from Counsel, stipulated to by Barbara Sibley, show that there has been absolutely no change in Mr. Sibley's financial situation.

Therefor, the Court, having been advised that all stays issued by Appellate Courts have expired as to the Court's prior findings of Contempt of Court for Non-Payment of Support, hereby reaffirms the prior findings, which are attached to and incorporated in this Order.

The Court has, by those previous factual and legal findings, found, and continues to find that Mr. Sibley has wilfully refused to pay any child support in this cause. He owes, at this time, over one hundred thousand dollars. In its previous Order fording Mr. Sibley in contempt, the Court ordered a payment plan. Mr. Sibley has not complied with the payment plan. Mr. Sibley has not paid even one penny of child support since he left the State of Florida. His behavior is the essence of wilful refusal to obey a Court order. He has substantial personal assets, jointly held with his present wife, which are easily liquidated to cash, which he has refused to use to pay even a small portion of his child support obligation. These assets include sterling silver and art, which could be sold and have not been. The Court notes that Mr. Sibley has retained private counsel, ordered and paid for court reporters and transcripts, transportation, and other litigation costs, including litigation that has been termed frivolous in Federal Court. He has not presented any alternate payment plan.

Therefor, it is Ordered and Adjudged that the Respondent, Montgomery Blair Sibley is ordered immediately committed into the custody of the Department of Corrections of Miami-Dane County. He is to surrender to that authority and the Department of Corrections shall maintain him in custody for an indefinite period, or until such time as he shall pay the purge amount of One Hundred Thousand Dollars, for child support due and owing.

The Court has, additionally, held a hearing on Mr. Sibley's incarceration and fords that his present financial status is unchanged and that he continues to 1) have the ability to pay the past due child support, and 2) that he is willfully refusing to pay

his child support obligation. The Court, therefor, will not abate the finding of Contempt, nor stay the Order for Incarceration.

The Director of the Department of Corrections is Ordered to comply with the Court's Order to hold Mr. Sibley in custody until such time as he shall purge his contempt with the aforementioned payment to Barbara Sibley, or her attorney.

November, 2002.

MAXINE COHEN LANDO
CIRCUIT JUDGE

Done and Ordered this 22nd day of November, 2002.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

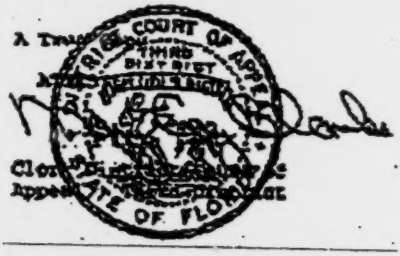
JULY TERM, A.D. 2002
NOVEMBER 22, 2002
CASE NO.: 3D02-3143
LOWER TRIBUNAL NO. 94-18177

MONTGOMERY BLAIR SIBLEY,
Appellant(s)/Petitioner(s),

vs.

LOIS SPEARS, DIR. DEPT..OF CORR.,
ETC., ET AL.,
Appellee (s) /Respondent (s)

Following review of the petition for writ of habeas corpus, it is ordered that said petition is hereby denied without prejudice to timely appeal, in which appellant may apply for expedited review. SCHWARTZ, C.J., and LEVY and SHEVIN, JJ., concur.



cc:
G. Bart Billbrough
Dirk Lorenzen
Jay M. Levy
Bette Ellen Quiat

IN THE DISTRICT COURT OF APPEAL OP FLORIDA THIRD DISTRICT

JULY TERM, A.D. 2002
DECEMBER 22, 2002
CASE NO.: 3D02-3171
LOWER TRIBUNAL NO. 94-18177

MONTGOMERY BLAIR SIBLEY,
Appellant,

v.

BARBARA SIBLEY,
Appellee.
_____/

An Appeal from the Circuit Court for Dade County, Maxine Cohen Lando, Judge

Billbrough & Marks and G. Bart Billbrough, for appellant. Jay M. Levy; Bette E. Quiat, for appellee.

Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.

SCHWARTZ, Chief Judge. The primary point of the appellant, who is incarcerated for indirect contempt because he failed to discharge an obligation for a large amount of admittedly past due child support--of which he has paid not a single cent--is that the record does not support the express finding below[1] that he has the present ability to pay the purge amount of $100,000.00. We disagree.

We do so because, as the record demonstrates Sibley may

command, simply by asking, the payment of the purge amount through his very wealthy father[2] --who has in effect given many hundreds of thousands of dollars to Mr. Sibley for any and every purpose except the discharge of this particular obligation. Among these are the payment of $250,000.00 cash for a business which nominally supports him, $200,000.00 in the "forgiveness" of a "loan" from the father, and large sums directly for the support of the appellant's present wife[3] and his other child. We are convinced that they include also very substantial sums in legal fees and costs in order to avoid payment,[4] as well as the maintenance of the present expensive proceeding to secure his release from prison without having to meet his adjudicated duty to support these children, even in the smallest part. His failure to do so stems, as the record again shows, and as the trial judge observed only from a stubborn, self-immolating hatred of and vendetta against his ex-wife, who also happens to be the mother of their children, and not from any "inability to pay." In these circumstances, which demonstrate the very epitome of a wilful, contemptuous refusal to obey a binding order of court, the rule that all sums from whatever source available to the contemnor-obligor must be considered to determine his "ability to pay" is peculiarly relevant. *Koll v. Koll*, 812 So. 2d 529 (Fla. 4th DCA 2002); *Mallardi v. Jenne*, 721 So. 2d 380 (Fla. 4th DCA 1998); *Pompey v. Cochran*, 685 So. 2d 1007 (Fla. 4th DCA 1997); *Rose v. Ford*, ___ So. 2d ___ (Fla. 4th DCA Case no. 4D02-954, opinion filed, November 27, 2002)[27 FLW D2560](dictum); see also *Klein v. Klein*, 122 So. 2d 205 (Fla. 3d DCA 1960); *Silvers v. Silvers*, 274 So. 2d 555 (Fla. 3d DCA1973); *Silberman v. Silberman*, 670 So. 2d 1109 (Fla. 3d DCA1996). Its application compels the rejection of the appellant's argument that, on the merits, he should not be in jail for civil contempt. In our judgment, he is in the right place for the right reason.[5]

Affirmed.

GODERICH, J., concurs.

DISSENT BY: COPE

DISSENT: COPE, J. (dissenting).

The incarceration order was entered on the theory that the former husband, Montgomery Blair Sibley, has sufficient personal property to sell so as to obtain the $100,000 purge amount. As the record does not adequately support that proposition, we should remand to set a proper purge condition.

I.

The parties divorced in 1994. The former husband was the primary residential parent. Both parents lived in the Miami area.

It was agreed by the parties that if the former husband moved away, the three children of the marriage would remain in the Miami area with Barbara Sibley, the former wife. In that event, the former husband was to pay child support of $4,000 per month.[6]

The former husband is a member of The Florida Bar who practiced law in Miami. Subsequent to the divorce, the former husband remarried. In 2000, the former husband moved to Maryland. This triggered the obligation to pay $4,000 per month in child support.

The former husband never paid any of the child support. After protracted enforcement proceedings in the trial court in which the former husband represented himself,[7] the trial court entered a civil contempt order providing for the incarceration of the husband. The purge amount was set at $100,000.

The former husband has appealed. By unpublished order, this court ruled that the former husband could obtain a stay of the order pending appeal by posting a $100,000 bond. The former husband has not posted the bond and is incarcerated.

II.

It seems to me that in footnote two of the majority opinion, the majority concedes the point which requires reversal. Footnote two states that the former husband has "substantial assets, although admittedly not in the purge amount, in his own name." Majority opinion at 2 n. 2 (emphasis added).

The incarceration order in this case was entered precisely on the theory that the former husband does have $100,000 in assets in his personal possession with which to satisfy the purge amount. The majority opinion concedes that the record does not adequately support the trial court's view of the matter.

The former wife testified that the former husband received in the dissolution of marriage various items of silver and artwork. She placed a value of $10,000 on one silver tray, but the record contains no valuation of any of the other items, and there is a dispute about the former husband's continuing ownership of some of the items.

Under *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985), the court must determine whether the contemnor possesses the ability to pay the purge amount. *Id.* at 1279. In making this determination, "the trial court is not limited to the amount of cash immediately available to the contemnor; rather the court may look to all assets from which the amount might be obtained." Id. (emphasis in original).

In the present situation, the trial court has at least two alternatives. One is to obtain reasonable estimates of value of the

items which remain in the former husband's possession. Because the property is in Maryland, the distance and expense of appraisal may make this an unattractive alternative.

The speedier alternative would be to modify the purge condition to allow release of the former husband upon turnover of the assets to a proper agent for the wife in Maryland. The wife would then be required to sell those items of personal property in a commercially reasonable manner. This approach would avoid the delay and expense of appraisal.

While the trial court's order does not say in so many words that the $100,000 purge amount was supposed to come from the personal property of the former husband, that is the only reasonable interpretation of the order.[8]Further, in her brief in this court, the former wife has defended the order on the theory that the former husband has sufficient assets to pay the purge amount. The former wife makes reference to the assets of the former husband's father--Harper Sibley, Jr.--only in passing in a footnote. Appellee's brief at 20 n. 12.

We should reverse the incarceration order and remand for the trial court to enter a revised purge condition, which the former husband would have the present ability to satisfy.

III.

The majority opinion takes the position that the former husband should obtain the purge amount from his father, Harper Sibley, Jr. This was not the basis of the trial court's ruling. In ruling as it has, the majority opinion relies on the "tipsy coachman" doctrine, or "right for the wrong reason" rule.

The Florida Supreme Court has said:

[Respondent] attempts to invoke the "tipsy coachman" doctrine,

which permits a reviewing court to affirm a decision from a lower tribunal that reaches the right result for the wrong reasons so long as "there is any basis which would support the judgment in the record." *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999).

As this Court recently reiterated in *Robertson v. State*, 27 Fla. L. Weekly S 829 (Fla. Oct. 10, 2002), the key to applying the tipsy coachman doctrine is that the record before the trial court must support the alternative theory or principle of law. See *Robertson v. State*, 27 Fla. L. Weekly at S 830; see also *State Dept. of Revenue ex rel. Rochell v. Morris*, 736 So. 2d 41, 42 (Fla. 1st] DCA 1999). On that basis, the doctrine cannot be applied in this case because the record does not provide an adequate basis for us to reach such materiality conclusion as a pure matter of law. *State Farm Fire and Cas. Co. v. Levine*, No. SC01-2085, at 4-5 (Fla. Dec. 19, 2002).

In the present case the trial court heard testimony from the former husband's father, Harper Sibley, Jr., in July 2002. The trial court limited the inquiry to two specific issues: the fact that Mr. Sibley had stopped paying the tuition for the grandchildren (the children of this marriage), and what gifts or property he had given to the former husband.

It is telling that the trial court itself restricted the amount of inquiry which could be made of Mr. Sibley, and after hearing the testimony, did not base the purge amount on Mr. Sibley's ability to pay. The trial court fashioned the contempt order and purge amount based on the trial court's conclusions regarding the former husband's ability to pay.

If there is a theory on which Mr. Sibley can be considered a source of funds to satisfy the purge condition, then proper procedure requires that issue to be first addressed in the trial court.

With regard to the merits, there is no question but that over the years, the former husband, the former wife, and the children of the marriage all enjoyed large gifts from Mr. Sibley. As a general proposition, however, this court has rejected the idea that the availability of loans or gifts from wealthy relatives translates into the present ability to pay a purge amount.

The former husband relies on *Perez v. Perez*, 599 So. 2d 682 (Fla. 3d DCA 1992), which said:

The purpose of a civil contempt proceeding is to obtain compliance on the part of a person subject to an order of the court. *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985). Where incarceration is under consideration as a possible remedy for a civil contempt, there must be "a separate, affirmative finding that the contemnor possesses the present ability to comply with the purge conditions set forth in the contempt order." *Id.* at 1279. While making that determination, the court may look to all of the contemnor's assets from which the amount might be obtained. *Id.* See *Russell v. Russell*, 559 So. 2d 675 (Fla. 3d DCA 1990).

In the present case, it appears the trial court based its finding of present ability to pay, and the finding of contempt, on the general master's outrageous theory that Perez could obtain a loan from his relatives. The findings of the general master, upon whose report the trial court relied, stated in part:

The General Master finds that the Respondent/Husband has the superior ability to pay the Petitioner/Wife's attorney's fees and costs as the testimony showed that he can readily borrow the funds from relatives.

. . . .

It is clear that under *Bowen*, the instant inquiry must be directed to the contemnor's own assets, not those of his relatives. Thus,

there must be a new hearing. *Russell*, 559 So. 2d at 676. As noted in *Russell*, the *Bowen* case envisions a two-stage inquiry in civil contempt proceedings: first, a determination of whether the respondent has willfully violated the court order, id. at 1278-79; second, the decision as to what remedy is appropriate. *Id.* at 1279. *Perez*, 599 So. 2d at 683; see also *Sol v. Sol*, 656 So. 2d 206 (Fla. 3d DCA 1995).[9]

Up to a point, the former husband's reliance on *Perez* is well taken. The mere fact that Mr. Sibley has in the past made large gifts to the former husband and family members is not (without more) sufficient to allow consideration of Mr. Sibley's assets in setting a purge amount for the former husband. In this case, however, there are other circumstances to be considered.

We are dealing with child support in this case. The court's orders must be respected, and the court cannot allow child support orders to be interfered with.

In the present case Mr. Sibley and the former husband are in business together. Mr. Sibley purchased a business for $250,000 which is operated by the former husband. The business manufactures custom carrying cases for computers and other sensitive equipment. There are three employees besides the former husband.

The former husband's net salary is $2,500 per month. The business pays another $2,500 per month for the rental of a house owned by Mr. Sibley, in which the former husband resides. The record reasonably supports the conclusion that the business also pays a great deal of the former husband's personal expenses.

The business currently operates at a loss. When additional working capital is needed, Mr. Sibley provides it. Of course, $2,500 per month routinely goes back to Mr. Sibley in the form of rent, so part of the working capital merely travels in a circle.

Although the point has not been raised below or argued here, it seems to me that we should treat as a civil wrong, or contempt, the structuring of employment arrangements so as to conceal income which would otherwise be available to satisfy an outstanding child support award. Where a third party participates in a scheme to conceal such income, then that should be a basis for imposition of liability on the third person, as well as the obligor. And the interweaving of the business affairs of the obligor and the third person distinguish such a case from Perez.

While the circumstances suggest that such collusion occurred in this case, that issue has not been asserted or tried in the trial court. We should allow the issue to be explored on remand.[10]

IV.

The present record certainly supports the proposition that the former husband is intentionally underemployed and has divested himself of assets which could have been used to pay his child support obligation. For such conduct the remedy is indirect criminal contempt, not civil contempt. As we have stated:

An intentional divestiture of assets with intent to avoid the payment obligation can be a ground for civil contempt.... Where there has been a divestiture of assets incarceration cannot be selected as the remedy because the contemnor does not have the present ability to purge himself. If the court concludes that the respondent has willfully divested himself of the ability to pay, then that conduct may be punished by incarceration or otherwise in a criminal contempt proceeding with the attendant due process safeguards. *Russell v. Russell*, 559 So. 2d at 677.

V.

In sum, the present record and established precedent do not

support the proposition that the former husband has the present ability to pay the $100,000 purge amount. The order now before us should be reversed and the cause remanded to set an appropriate purge amount or purge condition.

Notes:

[1] The presence of such a finding is indispensable to the validity of the order. See *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985).

[2] Notwithstanding that the appellant has adamantly refused to reveal many of his financial records--which in itself raises a strong presumption against him, *City of Miami v. Rantanen*, 645 So. 2d 4 (Fla. 1st DCA 1994)--the record shows substantial assets, although admittedly not in the purge amount, in his own name.

[3] The senior Sibley purchased a three-bedroom, three-story town home in Maryland in which the son, his new wife, and child lived and where he now lives alone. Although there is no record either that such a payment was ever made or what the source of such a payment may have been, see supra note 2, the rent supposedly due the father is $2500.00 per month.

[4] The following is only a partial recounting of the litigation he has unsuccessfully generated to achieve that end:

Sibley v. Sibley, 823 So. 2d 785 (Fla. 3d DCA 2002)(table); *Sibley v. Sibley*, 816 So. 2d 136 (Fla. 3d DCA 2002); *Sibley v. Sibley*, 815 So. 2d 673 (Fla. 3d DCA 2002), *review denied*, No. SC02-1309 (Fla. Nov. 22, 2002)(table); *Sibley v. Sibley*, 814 So. 2d 1054 (Fla. 3d DCA 2002)(table); *Sibley v. Sibley*, 793 So. 2d 959 (Fla. 3d DCA 2001)(table); *Sibley v. Sibley*, 803 So. 2d 738

(Fla. 3d DCA 2001)(table); *Sibley v. Sibley*, 795 So. 2d 71 (Fla. 3d DCA 2001)(table); *Sibley v. Sibley*, 791 So. 2d 481 (Fla. 3d DCA 2001)(table); *Sibley v. Sibley*, 771 So. 2d 1175 (Fla. 3d DCA2000)(table); *Sibley v. Sibley*, 751 So. 2d 586 (Fla. 3d DCA2000)(table); *Sibley v. Sibley*, 733 So. 2d 529 (Fla. 3d DCA1999)(table); *Sibley v. Sibley*, 732 So. 2d 1079 (Fla. 3d DCA1999)(table); *Sibley v. Sibley*, 725 So. 2d 1273 (Fla. 3d DCA1999); *Sibley v. Sibley*, 710 So. 2d 1017 (Fla. 3d DCA 1998); *Sibley v. Sibley*, 34 Fed.Appx. 969, ___ F.3d___ (11th Cir. 2002)(table).

[5] In the light of this conclusion, we consider that the appellant's other point, which claims defects in the orders below, see Fla.Fam.L.R.P. 12.615 (2002), does not present harmful error.

Gonzalez v. Gonzalez, ___ So. 2d ___ (Fla. 3d DCA Case no. 3D02- 1922, opinion filed, December 23, 2002); *Broadfoot v. Broadfoot*, 791 So. 2d 584 (Fla. 3d DCA 2001).

[6] There was also an agreement regarding the payment of tuition for the children at private schools and college. Those issues are not involved in the present appeal.

[7] It appears the first time the former husband hired counsel was for this appeal.

[8] Under Family Law Rule 12.615(e), the incarceration order should specify the intended source of the purge amount:

(e) Purge. If the court orders incarceration, a coercive fine, or any other coercive sanction for failure to comply with a prior support order, the court shall set conditions for purge of the contempt, based on the contemnor's present ability to comply. The court shall include in its order a separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual basis for that finding.(Emphasis added).

[9] Perhaps in this case or an appropriate case we should revisit *Perez*. By statute, Texas requires an obligor in a child support case to attempt to borrow the funds to pay the child support, or arrearage, from any appropriate available source, including relatives. See Tex. Fam. Code Ann. § 157.008(c)(3), (4) (Vernon2002); *Ex parte Bregencer*, 802 S.W. 2d 884 (Tex. App. 1991). The Texas approach appears reasonable.

[10] Where, as here, a business pays the former husband not only a salary, but his living expenses, it would appear to me that an income deduction order can be imposed, either on the husband's stated salary or on the gross income of the business. While that may be a tool to resolve the payment of child support on an ongoing basis, there is no showing anywhere that the business has the assets or income to supply the $100,000 purge amount.

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SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 31, 2003

CASE NO.: SC02-2644

Lower Tribunal Nos.: 3D01-3171

MONTGOMERY BLAIR SIBLEY vs. BARBARA SIBLEY

Petitioner Respondent

Petitioner's "Emergency Petition for Writ of Habeas Corpus, or Alternatively, Petition for Writ of Mandamus And/Or Petition for Conflict Discretionary Jurisdiction," filed December 20, 2002, has been treated as a prematurely filed Notice to Invoke Discretionary Jurisdiction from the decision of the Third District Court of Appeal in *Sibley v. Sibley*, 3D02-3171 (Fla. 3d DCA Dec. 23, 2002). Accordingly, the style of this case has been changed from *Montgomery. Blair Sibley v. Lois Spears, Director, Miami-Dade County Department of Corrections and Rehabilitation, and Barbara Sibley* to *Montgomery Blair Sibley v. Barbara Sibley.*

Petitioner shall submit the $250.00 filing fee, or a motion for leave to proceed in forma pauperis within ten (10) days from the date of this order. This case will not be submitted to the Court for consideration until receipt of one of the above.

Petitioner is further allowed up to and including February 10, 2003, within which to serve an initial brief on jurisdiction in this case pursuant to Florida Rule of Appellate Procedure 9.120.

Finally, petitioner's motion to expedite review is hereby denied.

A True Copy
Test:

Thomas D. Hall

dy
Served:
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JAY M. LEVY
DIRK LORENZEN
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HON. CHARLES J. CRIST, JR.

SUPREME COURT OF FLORIDA

TUESDAY, MAY 27, 2003

CASE NO.: SC02-2644

Lower Tribunal Nos.: 3D01-3171

MONTGOMERY BLAIR SIBLEY vs. BARBARA SIBLEY

Petitioner Respondent

Having reviewed petitioner's response to this Court's order to show cause dated March 13, 2003, this Court hereby amends it previous order dated January 31, 2003, to make clear that this case is a discretionary review proceeding from the decision of the Third District Court of Appeal in *Sibley v. Spears*, 3D02-3143 (Fla. 3d DCA Nov. 22, 2002), and not a discretionary review proceeding from the decision of the Third District in *Sibley v. Sibley*, 833 So.2d 847 (Fla. 3d DCA 2002), and hereby changes the style of this case back to *Montgomery Blair Sibley v. Lois Spears, Director, Miami-Dade County Department of Corrections and Rehabilitation, and Barbara Sibley.*

Having determined that this Court is without jurisdiction to review the decision of the Third District Court of Appeal in *Sibley v. Spears*, 3D02-3143 (Fla. 3d DCA Nov. 22, 2002), respondent's motion to dismiss, filed February 10, 2003, and motion to close case, filed February 27, 2003, are hereby granted and this case is dismissed for lack of jurisdiction. See *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002). All other pending motions are denied.

No motion for rehearing will be entertained by the Court.

A True Copy Test:

Thomas D. Hall
Clerk Supreme Court

bh
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MONTGOMERY BLAIR SIBLEY
HON. JOSEPH FARINA, CHIEF JUDGE